82-1305

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLACKSTONE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Question Presented

Whether the United States Court of Appeals for the Third Circuit properly concluded that the National Labor Relations Board failed to establish that discharges by Blackstone Company violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(3) because the National Labor Relations Board, after introducing evidence sufficient to permit the inference that anti-union animus was a motivating factor for the discharges, improperly shifted to Blackstone the ultimate burden of proof to establish that anti-union animus was not the real cause for the employees' discharge.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Blackstone Company cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 685 F.2d 102. The decision and order of the National Labor Relations Board (Pet. App. 16a-20a) and the decision of the administrative law judge (Pet. App. 21a-77a) are reported at 258 NLRB 945.

Jurisdiction

The judgment of the court of appeals (Pet. App. 11a-15a) was entered on October 1, 1982. This cross-petition is filed pursuant to Rule 19.5, Supreme Court Rules. The date of receipt of the petition for certiorari in connection with which the cross-petition is filed was January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

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[1] References to Appendix to Petition by the National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit are designated "Pet. App. —a". References to Appendix to Cross-Petition are designated "Cr. App. —a".

Section 8(a) of the National Labor Relations Act, 29 U.S.C. Section 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> • • •
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Section 10(c) of the Act, 29 U.S.C. Section 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

Section 7(d) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

Regulations Involved

The National Labor Relations Board Rules and Regulations, 29 C.F.R. Part 101, provide, in pertinent part:

> Section 101.2—*Initiation of unfair labor practice cases.*—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge. . . . The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. . . .
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> Section 101.4—*Investigation of Charges.* . . . The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. . . . After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or, the case may necessitate formal methods of disposition. . . .
>
> • • •
>
> Section 101.8—*Complaints.*—If the charge appears to have merit and efforts to dispose of it by informal

adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. . . .

• • •

Section 101.10—*Hearings*. . . . (b) The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act. . . .

Counter-Statement of Case

1. Robert Nagy was employed by Blackstone Company, Inc. ("Company") as a driver from September 1977 until his discharge for theft on March 1, 1979, three and one half months after the election which the Union lost.[2] (Pet. App. 49a). On February 26, 1979, Shipping Manager William Bostic received a telephone call from an electrical contractor at a construction site, stating that a droplight was missing and that the only delivery made that day had been by the Company. (Pet. App. 53a). Bostic checked his records and found that Nagy and Casimar Volosyn had made the delivery. The contractor's description of the driver, as stocky with dark hair, fit Nagy. (Pet. App. 53a).

Later that day, when Volosyn called in about an afternoon delivery, Bostic asked about the missing droplight. (Pet. App. 53a). Volosyn, because Nagy was nearby, replied that he could not discuss it. (Pet. App. 53a). The next day, Volosyn told Bostic that, after the delivery was made, Nagy stopped the truck, reached in back of the driver's seat, and pulled out a droplight. When Volosyn asked where he had gotten the droplight, Nagy replied that

[2] "Union" refers to Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

he had taken it from the delivery site. (Pet. App. 54a). On counsel's advice, President William Schwartz obtained a sworn statement from Volosyn. (Pet. App. 54a). Thereafter, on February 28, 1979, Bostic informed Nagy that he was suspended pending investigation for theft. (Pet. App. 53a-54a).

After Nagy's suspension became known in the shop, employees Jeffrey Prell and Jeffrey Barkaszi told Bostic about other thefts by Nagy. (Pet. App. 55a). On February 28, Schwartz interviewed and received a statement from Prell, who stated that: (1) he had witnessed Nagy steal lumber from a construction site and had helped him carry the lumber from the truck into Nagy's basement; and (2) he saw Company windows in Nagy's basement, which Nagy admitted he stole from job sites. (Pet. App. 55a). In an effort to substantiate these charges, Schwartz contacted the police and supplied them with copies of Volosyn's and Prell's affidavits. (Pet. App. 56a).

Thereafter, Barkaszi gave a statement to Schwartz recounting that: (1) Nagy bragged to him that employee Joseph Dafcik and he were stealing cinderblocks and windows; (2) Nagy boasted that he planned to steal Company doors; (3) he saw Nagy and Dafcik transfer a wheelbarrow from a Company truck to Dafcik's truck and later, when he saw the wheelbarrow in Nagy's basement, Nagy admitted it was stolen; and (4) he witnessed Nagy obtain a false $20.00 gas receipt from a Hess gasoline station in exchange for a marijuana cigarette. (Pet. App. 56a).

Two days after Nagy's suspension and Schwartz's notification of the East Brunswick police, Detective Joseph Soke searched Nagy's basement. (Pet. App. 57a). He found lumber which Nagy claimed he had permission to take, but none of the other stolen goods. (Pet. App. 57a). Soke did not search any other room in Nagy's house, nor did he

search Nagy's garage or yard. (Pet. App. 57a). Nagy initially consented to a lie detector test, but, after filing an unfair labor practice charge, he refused to undergo the test. (Pet. App. 57a).

On Friday, March 2, 1979, based on the conversations with the contractor and the statements of Volosyn, Prell, and Barkaszi, Schwartz discharged Nagy for theft. (Pet. App. 6a, 58a). After leaving Schwartz's office, Nagy returned and asked Schwartz not to prosecute if he returned the windows. (Pet. App. 58a). Schwartz said he would consider the offer if the windows were returned promptly. Nagy never returned the windows. (Pet. App. 58a).

In addition to the theft incidents set forth in the employee affidavits, other evidence of Nagy's dishonesty and irresponsibility was uncovered in the Company's investigation: (1) Volosyn saw Nagy attempt to steal a sump pump (Pet. App. 55a); (2) Nagy bragged to Barkaszi that he operated a theft ring at job sites with co-employees Dafcik, a convicted drug offender, and William Friewald, a warlock in the Church of Satan (Pet. App. 6a, 35a, 50a); (3) Richard Rizzo, General Counsel's witness, observed Nagy repeatedly obtain false gas receipts for reimbursement by the Company (Cr. App. 2a-5a; Pet. App. 6a, 50a); (4) Barkaszi observed Nagy smoke marijuana while driving for the Company (Pet. App. 6a, 50a); and (5) Nagy bragged to Volosyn he was planning to steal additional building materials (Pet. App. 54a-55a).

Moreover, the Company had ample cause to discharge Nagy prior to his termination for theft. On February 8, 1979, two and one-half months after the election, Nagy refused an assignment and threatened to pound Bostic's head in the snow. Nevertheless, Nagy was given only an oral reprimand for his misconduct. (Pet. App. 6a, 50a).

At the hearing before the administrative law judge ("ALJ"), Nagy's only response to the testimony of Schwartz, Bostic, Volosyn, Prell, Barkaszi and Rizzo was to deny each and every incident of wrongdoing. (Pet. App. 6a, 60a).

2. Kevin Moffat was employed by the Company on August 21, 1978, as a driver. He was terminated due to incompetence on September 21, 1978, at the end of his trial period, and two months before the Union election.[3] (Pet. App. 63a).

In accord with Company practice, Moffat began by accompanying experienced drivers to "learn the ropes". (Pet. App. 64a). He worked alongside Prell and Barkaszi, who instructed him and evaluated his work. (Pet. App. 6a, 64a). Prell observed that Moffat was a loafer who took constant coffee breaks instead of working. (Pet. App. 65a). Barkaszi advised Bostic that Moffat couldn't tie ropes, couldn't unload the material from the trucks, and had undue difficulty shifting, backing up, and controlling the truck. (Pet. App. 65a).

On September 15, 1978, in the late afternoon, Schwartz noticed a Company truck, without a driver, in a shopping center parking lot. (Pet. App. 65a-66a). When, after one half hour the driver had not appeared, Schwartz approached the truck and saw Moffat sitting on the front bumper, drinking a can of soda. (Pet. App. 66a). Schwartz informed Moffat that he was due back at the warehouse.

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[3] Moffat's contact with the Union was minimal. On September 8, 1978, he learned of the Union while stopping for breakfast at McDonald's. (Pet. App. 2a, 63a). A Union agent solicited Moffat and eight other Company drivers and Moffat signed a Union authorization card. (Pet. App. 2a, 63a). This was his sole affirmative act with regard to the Union. (Pet. App. 63a).

Thereafter, Schwartz informed Bostic, who placed a memo regarding the incident in Moffat's file. (Pet. App. 66a).

After three weeks on the job, Moffat drove with the most senior driver, Stephen Nemeth. Moffat nearly overturned the truck by exceeding the speed limit on a curve, although Nemeth had warned him to be careful. (Pet. App. 6a, 65a). Afterwards, Nemeth reported to Bostic that Moffat would not make it as a driver or a loader. (Pet. App. 6a, 65a).

On September 28, 1978, one month after Moffat was hired, Bostic terminated him for incompetence based on the unanimous recommendation of supervision and employees. (Pet. App. 63a). Such terminations were commonplace, due to the Company's rapid expansion and difficulty in finding qualified help. (Pet. App. 67a). Moffat was one of twenty-three people Bostic terminated during the first year following Bostic's hire in August 1978. (Pet. App. 67a). Bostic recorded Moffat's separation as a layoff so that Moffat could collect unemployment benefits without penalty. (Pet. App. 63a, 64a). Recording the termination as a layoff was in accord with Bostic's normal practice. (Pet. App. 64a, 67a).

3. In the face of the foregoing facts, the ALJ found that the Company violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. Sections 158(a)(1) and (3), by discharging Nagy and Moffat for union activity. (Pet. App. 63a, 67a). In concluding that the discharges violated the Act, the ALJ utilized the causation test announced by the National Labor Relations Board ("Board") in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1982), *cert. denied*, 455 U.S. 989 (1982). (Pet. App. 51a, 63a). In *Wright Line*, the Board required that General Counsel make a *prima facie* showing sufficient to raise the inference that protected activity was a motivating factor in the employer's decision to

discharge. Thereupon, a violation of Section 8(a)(3) would be found unless the employer established by a preponderance of the evidence that the discharge would have taken place even in the absence of the protected conduct. 251 NLRB at 1089.

The ALJ, applying the *Wright Line* test to Nagy's discharge, found that Genera. Counsel had made a *prima facie* showing, and that the Company had failed to sustain its burden of proof.[4] (Pet. App. 58a). In concluding that the Company failed to meet its burden of proof, the ALJ found that despite the corroborative testimony of Volosyn, Prell, Barkaszi, Rizzo, Bostic, and Schwartz as to Nagy's thievery, "Respondent has failed to support its defense that Nagy was a thief or that it was reasonable to have such belief." (Pet. App. 58a). The ALJ, without setting forth a rational explanation, found the testimony of neutral employees Prell, Volosyn and Barkaszi insufficient to sustain the Company's burden, stating: "In reaching these conclusions, I find in (sic) unnecessary to consider why the three employees acted as they did. . . ." (Pet. App. 62a).

Most significantly, the ALJ found employee Rizzo to be a "completely credible" and "impartial" witness and credited his account of the September 8, 1978 Union meeting. (Pet. App. 26a-27a). Nevertheless, the ALJ, in concluding that the Company had failed to sustain its burden, ignored Rizzo's testimony of Nagy's dishonesty in repeatedly obtaining false gas receipts. (Pet. App. 26a-27a, 56a; Cr. App. 2a-5a).

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[4] The *prima facie* showing consisted of evidence that certain statements made by Company Vice President Stanley Swerdlick to Nagy several months before his discharge violated Section 8(a)(1) of the Act. (Pet. App. 51a-52a). There was no evidence that Bostic, who suspended Nagy, nor Schwartz, who discharged him, harbored animus toward the Union or Nagy.

With respect to Moffat's discharge, the ALJ found that, based on Swerdlick's remarks and Moffat's attendance at a single Union meeting along with many other drivers, General Counsel had made a *prima facie* showing that Moffat's protected activity was a motivating factor for his discharge. (Pet. App. 63a). The ALJ then concluded that the Company "has not sustained its burden of establishing that Moffat fell within that group of poor workers so that he would have been fired in the absence of his having engaged in protected activity." (Pet. App. 67a). The ALJ reached this conclusion despite the fact that: (1) two supervisors and neutral employees Nemeth, Prell and Barkaszi testified that Moffat was incompetent, and there was no testimony in Moffat's behalf by the three drivers called by General Counsel (Pet. App. 6a, 64a, 65a); (2) Moffat was a thirty-day probationary employee when he was terminated (Pet. App. 63a); and (3) Moffat was one of twenty-three employees terminated by Bostic during Bostic's first year as a Company supervisor. (Pet. App. 67a). Significantly, the ALJ found that Nemeth, who issued a scathing indictment of Moffat's performance, was an "unbiased" and "credible" witness, yet concluded that his testimony was insufficient to sustain the Company's burden of proof. (Pet. App. 64a-65a, 67a).

The Board affirmed the decision of the ALJ without opinion and adopted his recommended order that Nagy and Moffat be reinstated with back pay. (Pet. App. 16a-20a).

4. The court of appeals vacated the portion of the Board's order reinstating and awarding back pay to Nagy and Moffat,[5] based on the court's prior rejection of the

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[5] Although the court sustained the Board's Section 8(a)(1) findings, it noted:

> [W]e might well have come to a different conclusion had we tried the case in the first instance. Our role, however, is limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of facts. (Pet. App. 3a-5a).

Board's *Wright Line* causation test in *Behring International, Inc.* v. *NLRB*, 675 F.2d 83 (3d Cir. 1982), *petition for cert. pending*, No. 82-438 (filed Sept. 13, 1982). The court rejected the *Wright Line* test because it placed the ultimate burden of proof in discharge cases on the employer, in contravention of the governing statutory and regulatory provisions.[6] In order to correct the Board's misallocation of the burden of proof, the court held that once General Counsel established a *prima facie* case of discriminatory discharge, the employer must articulate some legitimate, non-discriminatory reason for its actions. (Pet. App. 7a). The ultimate burden of proof remains on General Counsel to show by a preponderance of the evidence that

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[6] Section 10(c) of the Act, 29 U.S.C. Section 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

As interpreted by the Board's own regulations, Section 10(c) requires that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. Section 101.10(b). In addition, Section 7(d) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

anti-union animus was the real cause of the discharge. (Pet. App. 7a). Since the Board applied the erroneous *Wright Line* test, the court concluded that it had "imposed on the Company the task of establishing lack of impermissible motive and thus misallocated the burdens of proof", and remanded the case to the Board for reconsideration under the proper test. (Pet. App. 7a).

Reasons for Granting the Cross-Petition

For the following reasons, Respondent urges that: (1) its cross-petition for a writ of certiorari be granted; (2) this case be consolidated with *NLRB* v. *Transportation Management Corp.*, No. 82-168; and (3) Respondent be permitted to participate fully in oral argument and briefing.

1. The Board formulated the *Wright Line* test in order to provide a uniform causation test in Section 8(a)(3) discharge cases and thus alleviate the "intolerable confusion" and "conflict in this area among the courts of appeals." *Wright Line*, 251 NLRB at 1083, 1089. Instead, the *Wright Line* test, purportedly patterned on this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), has engendered added confusion and renewed conflict among the courts of appeals.

The First, Third and Seventh Circuits have rejected the *Wright Line* test because it improperly places the ultimate burden of proof on the employer, and have instead applied the test set forth by this Court in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), a Title VII discrimination case. *See NLRB* v. *Webb Ford, Inc.*, No. 81-3022 (7th Cir., Sept. 27, 1982); *NLRB* v. *Transportation Management Corp., cert. granted*, No. 82-168 (November 15, 1982); *NLRB* v. *Wright Line*, 662

F.2d 899, 905 (1st Cir. 1981), *cert. denied,* 455 U.S. 989; *Behring International, Inc.* v. *NLRB,* 675 F.2d 83, 90 (3d Cir. 1982), *petition for cert. pending,* No. 82-438 (filed Sept. 13, 1982).

Other circuits initially applied the *Wright Line* test, but have recently expressed doubts as to the legality of its burden-shifting approach. The Sixth Circuit utilized the *Wright Line* test in *Borel Restaurant Corporation* v. *NLRB,* 676 F.2d 190, 193 (6th Cir. 1982), but in a recent discharge case observed that: "[t]he question exists, therefore, as to whether analysis of mixed-motive cases under the National Labor Relations Act should proceed under *Mt. Healthy* or *Burdine*". *NLRB* v. *Comgeneral Corp.,* 684 F.2d 367, 370 (6th Cir. 1982). The Fifth Circuit apparently approved the *Wright Line* test in *Red Ball Motor Freight, Inc.* v. *NLRB,* 660 F.2d 626, 627 (5th Cir. 1981), *cert. denied,* —— U.S. ——, 73 L.Ed.2d 1293 (1982), but in *Weather Tamer* v. *NLRB,* 676 F.2d 483, 485, n.4 (5th Cir. 1982), noted that "[w]hether the analysis used by the Board (in discharge cases) is appropriate under our case law is unclear."

By contrast, the Eighth and Ninth Circuits have expressly disagreed with the First and Third Circuit's approach, and endorsed the *Wright Line* test. *See Zurn Industries, Inc.* v. *NLRB,* 680 F.2d 683, 687 (9th Cir. 1982); *NLRB* v. *Fixtures Manufacturing Co.,* 669 F.2d 547, 550 (8th Cir. 1982).

Thus, there is direct conflict among the courts of appeals on this issue. Moreover, determination of the proper test for identifying violations of Section 8(a)(3) is essential for day-to-day enforcement of the Act in countless discharge cases. Consequently, this case presents a "conflict on what is obviously a recurring issue that should

be resolved." *Red Ball Motor Freight, Inc.* v. *NLRB*, 73 L.Ed.2d at 1293 (White, J., dissenting from the denial of certiorari).

2. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court decided an important question of federal labor policy—the legality of bargaining orders premised on a majority of union authorization cards. Faced with such a vital issue, the Court, prior to its decision, consolidated two separate cases and determined the propriety of such bargaining orders only after carefully measuring them against the different factual contexts offered by each case.[7] *Id.* at 579-80.

The instant case presents an issue of similar importance to federal labor policy—the allocation of burden of proof in cases alleging anti-union discrimination. The Court's determination of the allocation of burden will be dispositive in the litigation of innumerable discharge cases, each arising in a different factual context. Moreover, the Court's decision will provide the analytical framework for Board investigation of Section 8(a)(3) charges, as well as for Board determinations to dismiss the charges or issue complaints.[8] Thus, as in *Gissel*, the importance of the issue

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[7] In fact, the *Gissel* decision was a consolidation of four cases, three of which were consolidated and filed as a single petition with the Court following separate Fourth Circuit decisions. *Id.*

[8] The NLRB Rules and Regulations, 29 C.F.R. Part 101, provide, in pertinent part:

> Section 101.2—*Initiation of unfair labor practice cases.*—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge. . . . The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. . . .
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(Footnote continued on following page)

before the Court, and the impact of its resolution on national labor policy, mandates the consolidation of this case with *NLRB* v. *Transportation Management Corp.*

Furthermore, the instant case is the superior vehicle for resolution of the question facing the Court. In *Transportation Management Corp.*, the First Circuit did not consider the validity of the employer's asserted justification for discharge, and there was no finding by the court that the employer proffered a legitimate justification. 674 F.2d at 131. The absence of any finding on the key issue of the sufficiency of the employer's justification renders *Transportation Management Corp.* ill-suited to a reasoned determination of the proper discharge test.

By contrast, in *Blackstone Company*, the Third Circuit examined the Company's justification and explicitly found that the Company had "proffer[ed] a legitimate non-dis-

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(Footnote continued from preceding page)

Section 101.4—*Investigation of Charges.* . . . The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. . . . After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or, the case may necessitate formal methods of disposition. . . .

* * *

Section 101.8—*Complaints.*—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. . . .

criminatory justification for the discharges". (Pet. App. 6a). In the case of Nagy, the court found that the affidavits and testimony of Volosyn, Prell and Barkaszi regarding Nagy's thievery "created a dispute as to the true motive behind Nagy's discharge". (Pet. App. 6a). Similarly, with Moffat, the court found that Nemeth's testimony as to Moffat's incompetence, specifically credited by the ALJ, counterbalanced the Board's *prima facie* case by introducing "conflicting evidence as to the reason for Moffat's discharge". (Pet. App. 7a).

Unlike *Transportation Management Corp., Blackstone Company* presents a legitimate non-discriminatory justification rebutting the Board's *prima facie* case of discrimination and will therefore better enable the Court to determine the proper allocation of burden of proof.

Moreover, in *Transportation Management Corp.* there was direct evidence of animus by the supervisor towards the discharged employee, whereas such evidence was wholly lacking in *Blackstone Company*. 674 F.2d at 131. Thus, the *prima facie* case in *Transportation Management Corp.* was more compelling than in *Blackstone Company*. As a result, *Blackstone Company* highlights the anomalous impact of the *Wright Line* test, in that a tenuous *prima facie* case was found sufficient to support a Section 8(a)(3) violation because the ultimate burden of proof was improperly placed on the Company.

3. The Company has spent significant time and resources litigating this case since the Union election loss in November 1978. The Court's resolution of this case will in all likelihood determine whether the Company must reinstate a thief and a dangerously incompetent driver.

The Board seeks to invoke this Court's power of discretionary review, but requests that it grant review in such

a manner as to exclude the Company from participation, and have the Company's rights adjudicated on the facts of a different, and inferior, case.[9] Fairness to the Company, as well as the interest of the Court in having the proper context to evaluate this issue, dictate that *Blackstone Company* be consolidated with *Transportation Management Corp.*, and that the Company be allowed to participate fully in oral argument and briefing.

CONCLUSION

The cross-petition for a writ of certiorari should be granted, and this case should be consolidated with *NLRB* v. *Transportation Management Corp.*, No. 82-168, with Respondent being permitted to participate fully in oral argument and briefing.

Respectfully submitted,

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JOSEPH P. PARANAC,
On the Petition.

[9] Specifically the Board has requested that the instant case "be held and disposed of in light of the Court's decision in NLRB v. Transportation Management Corp., No. 82-168." (Pet. 10).

APPENDIX

Excerpts from Transcript of Proceedings

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

TWENTY-SECOND REGION

Case No. 22-CA-8880
22-CA-9093
22-RC-7657

IN THE MATTER OF:

BLACKSTONE COMPANY, INC.

and

TEAMSTERS LOCAL UNION NO. 35 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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970 Broad Street
Newark, New Jersey
Friday, February 1, 1980

The above-entitled matter came on for further hearing pursuant to adjournment, at 10:00 a.m.

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Richard Rizzo—for Respondent-Employer—Redirect

(458)* RICHARD RIZZO, having been previously sworn, was examined and testified as follows:

Redirect Examination by Mr. Eisenberg:

Q. Mr. Rizzo, I represent to you that Mr. Nagy has testified that you told him that Stanley Swerdlick had you up against the wall and was threatening you for the purpose of getting you to give information about the union. Is that true? A. No; it's a lie.

Q. Have you ever seen Mr. Nagy obtain a phony gas receipt while a driver for Blackstone? A. Yes.

Q. On how many occasions, approximately? A. Two or three.

(459) Q. Can you recall the incidents more specifically?

Mr. Mintz: Your Honor, I'd object unless Mr. Eisenberg sets forth the dates when this occurred, and the representation that the company knew about these incidences and they formed a basis for Mr. Nagy's discharge.

Mr. Eisenberg: Your Honor, Mr. Nagy has testified that he never obtained a false receipt. Therefore, it's perfectly admissible as a matter of credibility. It does not have to be a basis of discharge.

Judge Bennett: I take it, then, that this is for a collateral attack upon Mr. Nagy's credibility.

Mr. Eisenberg: Yes, sir.

Judge Bennett: You're not adducing this testimony now to serve as a defense for the discharge?

Mr. Eisenberg: No, sir.

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* Numbers in parentheses without prefix refer to pages of the trial transcript.

Richard Rizzo—for Respondent-Employer—By the Court

Judge Bennett: Objection overruled.

Q. Can you recall what he did? A. He pulled into a gas station for gas. He asked the attendant, give me five dollars worth, and give me a receipt for over the cost that he gave him.

Mr. Eisenberg: No further questions.

Judge Bennett: I don't know if you had asked and we got caught up in the colloquy:

Examination by Judge Bennett:

Q. Do you remember when each of these (460) incidents occurred? A. I don't remember exact dates, but it was in 1978.

Q. In 1978? A. Yes.

Q. And how many times did this happen, in all, that you are personally familiar with? A. Two or three times.

Q. You were in the truck with Mr. Nagy when this occurred? A. Yes.

Q. Who was driving? A. Mr. Nagy.

Q. And were you there as a helper then? A. Yes.

Q. And you overheard these conversations between Mr. Nagy and the gas station, attendant? A. Yes.

Q. Did Mr. Nagy get what you described as a phony gas receipt from the attendant, after requesting such? A. Yes.

Q. Did you see whether or not Mr. Nagy gave anything to the gas station attendant in exchange for the gas receipt? A. I don't understand that question.

Q. Well, can you tell us why, if you know, the gas station attendant was willing to give him this receipt? (461) A. Oh. Sometimes he gave him a couple dollars on the side.

Q. Mr. Nagy gave the attendant? A. Yes.

Richard Rizzo—for Respondent-Employer—Recross

Judge Bennett: I have no further questions. Do you have any questions, Mr. Mintz?

Mr. Mintz: One moment, please.

Recross-examination by Mr. Mintz:

Q. Do you know how much above the actual purchase amount false receipts were given for? A. I don't remember exactly, no.

Q. You have no idea? A. On how much? No.

Q. Did you see the receipts? A. Once or twice I did.

Q. Do you recall him asking for five dollars, though? A. Yes.

Q. But you don't recall what the receipt said? A. Once or twice I saw them and some of them said ten or 15, sometimes more.

Q. You said some of them? A. Yes; one or two of them.

Q. One or two of them said ten dollars, 15 dollars, sometimes more? A. Right.

(462) Q. How many times did you see it say more than ten or 15? A. Once or twice.

Q. And how frequently did you see this happen? Or the times that you saw it happen, did they occur in a row, or was there a long lapse of time before the next time?

Mr. Eisenberg: Objection; that question is almost unintelligible. Did they occur in a row or was there a long lapse between more than two events. That's a question that cannot really be answered.

Mr. Mintz: Well, I'll—

Judge Bennett: Well, if the witness understands it, fine. You may not understand it but the witness may. If the witness can answer it, fine. If Mr. Mintz wants to rephrase it, that's also okay.

Q. Do you understand the question? A. No, I didn't.

Richard Rizzo—for Respondent-Employer—Recross

Q. Do you recall how much time elapsed between the first time you witnessed this event and the second time? A. I can't remember the time. I was always out with a different driver.

Q. You have no idea how much time elapsed? A. No.

Q. Do you have any idea how much time elapsed between any of these occurrences? A. A couple weeks, two, three weeks.